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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 853

HENRY WALLACE WINCHESTER, ET AL.,
Petitioners,

vs.

J. D. GREGG, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioners, respondents in the court below, respectfully pray that a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled Cause on the 14th day of February, 1949 (Rec. Vol. 11, pp. 638-649) and which was amended on March 1, 1949, and as to which a petition for rehearing was filed, and was denied on March 31, 1949 (Rec. Vol. 11, pp. 625-4). The judgment of said Circuit Court of Appeals is final.

Opinion Below

The Circuit Court of Appeals for the Ninth Circuit rendered two Opinions in the case which are not yet reported.

The original Opinion appears in Vol. 11 of the Record at pages 638 to 649 and the Opinion rendered upon the denial of a Petition for Rehearing appears in Volume 11 of the Record at pages 652-4.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347-a).

Statute Involved

The statute involved is Title 28 U. S. C. A. Section 2283.

Summary Statement

The facts, as shown by the verified complaint herein are as follows:

(1) the map attached to said complaint is a substantially correct representation of an area of land comprising about one and one-half square miles improved, as therein shown with highways; a community park; a community church; chapel and public school; and homes for human residence, which are devoted to said uses (Tr. Vol. 1, p. 60);

(2) the 115 acres of land, as shown upon said map, is referred to as the "Critical" area, the area enclosed with a heavy line is referred to as the "Communty" area, and the area covered by said map is referred to as the "Map" area (Tr. Vol. 1, pp. 4 to 7, incl.);

(3) in 1914 the lands within this community area were restricted by deed to *residential*-agricultural use, and against the production of rock aggregates, for the next twenty years (Tr. Vol. 1, pp. 7, 8 and 10);

(4) many parcels of these lands were sold and developed for *residential* uses (Tr. Vol. 1, pp. 15 and 16);

(5) that in 1918, this area, then known as a part of Hansen Heights, was annexed to the City of Los Angeles (Tr. Vol. 1, p. 10);

(6) in 1919, the residents of this area, in conjunction with those of a larger area, organized Mun. Imp. Dist. No. 9, and bonded their properties for $150,000, to obtain an adequate water supply for this area;

(7) in July, 1925, nearly nine years before the expiration of said deed restrictions, the City enacted its zoning ordinance No. 52,421, by which this community area was declared to be a *residential* area, and from which the mining of rock aggregates was excluded (Tr. Vol. 1, pp. 10 and 11);

(8) in June, 1926; May, 1927; August 15th, 1927; and August 27th, 1927, by its enactment of its ordinances numbers, respectively, 55,129; 57,958, 58,624, and 58,375, *the city reaffirmed* its zoning classification of this community area as a *residential* area, and its exclusion therefrom of the business of mining rock aggregates (Tr. Vol. 1, p. 11);

(9) in June, 1926, and in June, 1928, upon petition of the people, the City consummated proceedings for the concrete paving of about seven and one-half miles of the public streets within said area, and *assessed the costs* of said improvement upon the lands within said area (Tr. Vol. 1, p. 5);

(10) in 1928, upon petition of the people, the City consummated proceedings for the organization of Mun, Imp. Dist. No. 57, and the acquisition and improvement of a fifteen acre public park and recreation center immediately across a forty foot street from this critical area, and *bonded the property* within said community area, for the payment of its cost (Tr. Vol. 1, pp. 14 to 16, incl.);

(11) in June, 1930; February, 1933; September, 1934, and November, 1936, the City by its enactment of its ordi-

nances numbers, respectively, 66,750; 72,327; 74,140, and 77,000 *reaffirmed* its zoning classification of this community area as a residential area, and its exclusion therefrom of the business of mining rock aggregates (Tr. Vol. 1, p. 11);

(12) in August, 1934; July 7th, 1936; July 21st, 1936; July 7th, 1939, and January, 1940, the City Planning Commission reaffirmed its zoning protection of this community, by denying five separate applications for permission to mine rock aggregates within this community area;

(13) in 1942, upon petition of the people, the Remsen Avenue school, located about one-half mile westerly of this community area, and about 900 feet from a potential rock excavation operation, was abandoned, and as a replacement therefor, the Stonehurst School was established within this community area, as shown upon said map, about 600 feet from said critical area (Tr. Vol. 1, pp. 17 to 20, incl.);

(14) in 1944 the City began, and continued through 1945, and until March 7th, 1946, a comprehensive survey of zoning conditions, and on March 7th, 1946, it enacted its comprehensive zoning ordinance, number 90,500, which became effective June 1st, 1946. By this ordinance, the City *reaffirmed* its classification of this community area as a *residential area* (Tr. Vol. 1, pp. 20 to 22, incl. and p. 62);

(15) during the thirty-two year period from 1914 (the year of the deed restrictions), to October 2nd, 1946 (the date of the permit challenged here), this community area, of less than one and one-half square miles, under the encouragement of said deed and zoning protection against the rock industry, was improved with more than 360 homes occupied by more than 1750 persons of whom more than 350 were children under the age of sixteen years; two churches, attended by 418 pupils; and a public park and recreation center attended by more than 200 persons each day, and

2000 persons each week, many of whom are children under the age of six years, who, unattended, patronize the supervised recreational facilities of said recreation center for the maintenance of which the City expends about $6,000 annually (Tr. Vol. 1, p. 48);

(16) during the two and one-half years immediately preceding October 2nd, 1946, fourteen of the home owners in said community area, at a cost to them of more than $150,000, purchased and improved their home properties which lie either immediately adjoining, or immediately across a forty-foot street, from said critical area (Tr. Vol. 1, p. 44);

(17) during this thirty-two year period of *residential* classification, development, use, and protection against invasion by the rock industry, no substantial change in the *residential* character of this community area has occurred (Tr. Vol. 1, p. 31). It is now, and consistently has been throughout that thirty-two year period, a *residential* community (Tr. Vol. 1, pp. 9, and 21 to 22, incl., and 25);

(18) immediately following the effective date (June 1st, 1946) of said comprehensive zoning ordinance, the defendant Gregg applied to the Planning Commission of said City for a permit to excavate said critical area which was then owned by him (Tr. Vol. 1, pp. 27 to 28, incl.);

(19) said application was denied by said Planning Commission, by the unanimous votes of all of its members, on July 25th, 1946, upon the grounds (1) that an excavation for the commercial production of rock, sand, and gravel, was not the highest and best use of said land; (2) that said property is adapted to residential development and use; (3) that the "RA" zoning then upon said property, was appropriate for said property and for that general area, as evidenced by the residential development in that immediate

neighborhood; (4) that the pit which would be left after the excavation was completed, would create an unsightly and dangerous condition, detrimental to the public welfare and safety, and would leave the land in a condition unsuited for use in keeping with others in that community; (5) that the creation of such a condition would adversely affect individual property rights, and would interfere with the normal growth of that community, and (6) would conflict with the objectives of the City's Master Plan of Zoning (Tr. Vol. 1, pp. 28 to 30, incl.);

(20) thereupon the defendant Gregg appealed to the City Council from said ruling, and on October 2nd, 1946, eleven members of the City Council, each of whom on the preceding March 7th had voted to continue said twenty-one year zoning restriction against any excavation for the commercial production of rock aggregates in this community area, voted to grant this permit to the defendant Gregg, to excavate this 115 acre tract to a depth of one hundred feet, or more, *in the heart* of this community area (Tr. Vol. 1, pp. 30 to 33, incl.);

(21) said grant of said permit, was, and is, opposed, not only by the City Planning Commission, but also by the City Board of Education, the Health Department of the City School System, the City Park, Playground, and Recreation Department, the principal and teachers of the School in this community area; the churches; the American Legion Post, and the people throughout a large area of which this community is a part (Tr. Vol. 1, pp. 34, 45, and 48);

(22) the conduct of operations upon this 115 acre tract of land, would produce loud, raucous noises, and dust and dirt, that would be carried to the homes of each of these petitioners, and which would substantially interfere with, and depreciate, the comfortable enjoyment of said homes

by the owners and occupants thereof, and would constitute a substantial detriment to the health of these petitioners, and would substantially interrupt, and interfere with the proper conduct of the school, and the supervised recreational courses of the City Recreation Department, in said public park and in said community area (Tr. Vol. 1, pp. 36 to 38, incl.; pp. 51 to 53, incl., and p. 56);

(23) the pit which would be created by the excavation of said area, would be attractive to children of tender years, and would be a substantial and permanent hazard and danger to the safety of the children of these petitioners.

(24) the conduct of operations under this permit, and the excavation of a permanent pit one hundred feet deep and more than ninety acres in area, *in the heart of this community*, would very substantially disturb each of these petitioners in their comfortable enjoyment of their homes, and would very substantially depreciate the market value of their properties (Tr. Vol. 1, pp. 55 and 56);

(25) the structure and placement of the materials which compose said lands within said critical area, are such that there is a reasonable probability that in the course of time, by natural processes of erosion, or otherwise, the side walls of a pit dug thereon, at their surface would recede, so that said pit would substantially encroach upon the public streets, and upon the improved lands which bound said critical area, and would thereby destroy some substantial portion thereof (Tr. Vol. 1, pp. 35 and 36, and Vol. 2, pp. 568 and 569);

(26) excepting for the petitioner Dell 'Olio, each of these petitioners is an owner of a parcel of land situated within said community area, which is, and for many years has been improved, occupied, and used, as and for residential uses and purposes, and has a reasonable market value in excess

of $12,000, and that each of said petitioners actually resides upon his said property with his family (Tr. Vol. 1, p. 40);

(27) the conduct of operations upon said critical area, as authorized by said permit, would depreciate the reasonable market value of each of said home properties in a sum substantially in excess of $3,000, and that by the conduct of such operations, each of said petitioners would be damaged in a sum in excess of $3,000 (Tr. Vol. 1, p. 40);

(28) the defendant Gregg threatens to, and will unless restrained by an order of the Court, excavate said critical area for the commercial production of rock, sand, and gravel, as authorized by, and under the purported authority of said variance permit (Tr. Vol. 1, p. 59);

(29) said conduct of said City, is an unreasonable and oppressive exercise of its police power as to these petitioners, and is in excess of the just limits of its police power, and is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America (Tr. Vol. 1, p. 53);

(30) said conduct of said City, constitutes a taking of the properties of these petitioners without just compensation, and without any public necessity therefor, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America (Tr. Vol. 1, p. 53);

(31) in its grant of said permit said City exercised its police power solely for the benefit of said defendant Gregg, and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America (Tr. Vol. 1, pp. 54, 55);

(32) in the circumstances of this case the defendant City was, and is, estopped to grant said permit (Tr. Vol. 1, pp. 56, 57);

(33) none of these plaintiffs has any plain, speedy, or adequate remedy at law (Tr. Vol. 1, p. 3);

(34) on November 22, 1946, an action was filed and is now pending in the California State Court by owners of properties claimed to be affected adversely by said zoning proceedings. The parties to this action in the Federal Court *were not parties* to said action in the State Court. Judgment was rendered after trial in favor of the defendants in said State case and said case is now pending on appeal in the State Courts.

(35) on November 14, 1947, this action was begun in the United States District Court by the owners of other real properties claimed to be adversely affected by said zoning proceedings. The parties plaintiff in said State case *are not parties* to this action. The District Court took jurisdiction of this case and issued a preliminary injunction and stayed further proceedings herein until the termination of said State Court proceedings. The defendants appealed, and the Circuit Court reversed.

Holding of the Circuit Court of Appeals

The honorable Ninth Circuit Court of Appeals has held (1) that under the Class Action rule these petitioners *are* parties plaintiff in the action pending in the courts of the State of California, in which they are *not named* and to which they have *not consented*, and of which they have *not accepted* any benefits, and which action was begun prior to the commencement of this action, by persons not parties to this action, and (2) that under the rule of Comity, or Necessity, the District Court should not have accepted jurisdiction in this case, and reversed the rulings of the District Court with directions to dismiss this action.

Question Involved

The principal questions here involved are:

I

Is the jurisdiction of the Federal Court to be denied to these petitioners, under the rule of Comity or Necessity, because of the pendency of a case in the State courts to which under *the law of the State of California* these petitioners are not parties, either actually or fictionally, and in which these petitioners cannot obtain the relief they sought and obtained in this action even though they were made parties to said State case.

II

Assuming the application of the Class Action rule to the case at bar, should the judgment of the Circuit Court, in the circumstances of this case, direct the doing of anything more than that which the District Court did, namely, stay further proceedings in the case at bar until the final termination of said State case?

Reasons Relied On for the Writ of Certiorari

I

The complaint states a cause of action for relief under the Fourteenth Amendment to the Federal Constitution.

The complaint alleges that the action of the defendant City, as an agency of the State, in the exercise of its police power, is unreasonable, and, therefore, is void under the federal Constitution. *This presents a federal question.*

Home Telephone Co. v. *City of Los Angeles,* 227 U. S. 278;

Raymond v. *Chicago Traction Co.,* 207 U. S. 20;

Dobbins v. *City of Los Angeles,* 195 U. S. 223;

Young, Ex parte, 209 U. S. 123;
Snowden v. *Hughes,* 321 U. S. 1;
Mugler v. *Kansas,* 31 L. Ed. 205, 211;
Crowell v. *Benson,* 76 L. Ed. 598;
Pennsylvania Coal Co. v. *Mahon,* 260 U. S. 393;
Times Mirror Co. v. *City of Los Angeles,* 3 Cal. (2d) 309.

II

The complaint pleads a special injury to the persons and properties of each of these petitioners, which is essential to the invocation of equitable relief in the Federal Courts.

Dobbins v. *City of Los Angeles,* 195 U. S. 223;
Jardine v. *City of Pasadena,* 199 Cal. 64;
Mugler v. *Kansas,* 31 L. Ed. pp. 205, 211;
Crowell v. *Benson,* 76 L. Ed. 598, 617;
Pennsylvania Coal Co. v. *Mahon,* 260 U. S. 393, 416.

The complaint pleads an invasion of the privacy of their homes by noise and dust; an interference with their personal comfort, by noise and dust, and a trespass upon their properties by dust and erosion.

The Honorable Circuit Court errs in its assumption that the *res* in this action is the same as the *res* in the pending State case. Clearly the right of each of these appellees is derived from the fact of his ownership of real property which may be injuriously affected by an unreasonable exercise of public power. It may well occur that as to one or more but less than all of the property owners involved in the two suits, the zoning action complained of would be an unreasonable and therefore void exercise of the police power because of its unreasonable interference with the enjoyment of the properties respectively of such persons, and yet as to all other property owners the zoning action complained of would be good.

It cannot be said, therefore, in any real or legal sense that the *res* in the two actions is the same. In these circumstances it is not proper for the Court to refuse jurisdiction at the instance of a property owner who may be circumstanced differently than another property owner. His complaint against the zoning power may be good, although the complaint of other property owners may be bad.

It has never been the rule or the practice, except in clear cases, to deny to any person his day in the Court of his own choice where the enjoyment of his own real property is at stake, simply because the owner of some other real property is seeking in another forum the same relief in respect of his individual property.

The actual and recognized dissimilarities in parcels of real properties, distinguishes any case in which they constitute the *res*, from the property involved in what is known as the "common fund" cases. Here there is no "common fund," and there are no properties identically situated or affected in identically the same manner in respect of the zoning action complained of.

III

California is a minority State in its application of the class action rule. In California, *it is settled law* that a complaint which pleads that it is begun and prosecuted on behalf of *"all persons similarly situated,"* although not named as parties, does not bring such parties into action, or bind them, unless they actually join in the action, or accept the benefits of the action.

Central Irr. Dist., In Matter of, 117 Cal. 382, 388;
Haese v. *Heitzig,* 159 Cal. 569, 573, 474;
Compton v. *Jessup,* 68 Fed. 263;
Howard, Ex parte, 19 L. Ed. 634;
Freeman on Judgments, Vol. I, pp. 952, 956.

There is no showing here which meets any of these conditions. These petitioners are not parties to the State case. They have never taken any part in it. They have never accepted any benefits from it.

This vital distinction, in the application of the Class Action Rule, between the law of California, and the law of the jurisdictions from which stem the cases relied upon by the Honorable Circuit Court, is completely ignored in the decisions of the Circuit Court.

IV

In the absence of the application of a class action rule which in most States, *but not in California,* binds persons similarly situated, these petitioners cannot be denied their constitutional right to invoke federal jurisdiction for redress for a violation of their immunities under the Fourteenth Amendment to the Federal Constitution.

The fact that these petitioners could have elected to pursue their remedy in the State Courts, as did the plaintiffs in the State case, does not preclude them from pursuing their remedy in the federal Court. They were not bound to make that election simply because others, who acted first, had selected the State forum.

Porter v. *Inv. Synd.*, 286 U. S. 471, 76 L. Ed. 1226;
Bacon v. *Rutland R. R. Co.*, 232 U. S. 134;
Pennekamp v. *Fla.*, 328 U. S. 331, 335.

V

Indisputably, the parties plaintiff here cannot apply for, or obtain, any relief in the pending State case, to which they are not parties either in fact or in law.

Furthermore, *if they were* now made parties plaintiff in the pending State case, they could not obtain in that case the preventive relief they seek here to maintain a *status*

quo pending a final determination of the validity of the permit challenged there and here.

This is true because in the State case there was no restraint at the time of judgment and appeal, and in those circumstances, the Appellate Courts in California have no jurisdiction to enjoin Gregg's operations pending the appeal in that case (*Hicks* v. *Michael*, 15 Cal. 107; *Napa, etc,* v. *Calistoga*, 174 Cal. 411; *McCann* v. *Union Bk.*, 4 Cal. (2d) 24, 27; *Seltzer* v. *Musicians, etc.*, 12 Cal. (2d) 718, 719; *Canavaris* v. *Theatres, etc.*, 15 Cal. (2d) 495, 500; *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 293).

For the reasons above stated the doctrine of comity does not apply. This is the clear holding of the cases hereinabove cited, and of *Merced Dredging Co.* v. *Merced County*, 67 Fed. Supp., pp. 598, 605, where the Court said:

> *"Rules of comity or convenience, must give way to constitutional rights, and when the case presented is one where a federal court of equity should intervene, it will not hesitate to do so."*

Upon the record here, it is a necessary conclusion that these plaintiffs are not precluded from pursuing their remedy in the Federal court for a violation of their immunities under the Fourteenth Amendment, simply because *other persons aggrieved,* as *to their properties,* by the same unconstitutional exercise of the police power, have pursued, and are pursuing a remedy in the State Court. The plaintiffs here are not required to hazard their constitutional rights upon the outcome of a case to which they are not parties; in the prosecution of which they have no voice; in which they cannot apply for, or obtain, any personal relief, and which is being prosecuted in a jurisdiction they did not select.

VI

The utmost which the Honorable Circuit Court of Appeals should have done, in deference to the pending of an earlier State case brought by other parties (*not these petitioners*), and involving *other properties, homes,* and *persons,* would be to stay further proceedings in this case until the termination of the State case. This the learned trial court did do. Therefore, the orders appealed from should be affirmed.

Conclusion

In conclusion, we respectfully submit that the complaint here pleads a strong and compelling case for equitable relief under the Fourteenth Amendment to the Federal Constitution; that the question presented is a Federal question cognizable in the Federal courts; that the action pending in the State courts upon behalf of persons who are *not parties* to this action, and to which the plaintiffs here are *not parties* either in fact or in law, does not bar or suspend the jurisdiction of the court in this case.

In its grant of the Preliminary Injunction here appealed from, the learned District Court did nothing more than to exercise the power conferred, and to perform the plain duty imposed, upon that court by the Constitution and the laws of the United States (*Thornton* v. *Rose Imp. Dist. No. 1,* 291 Fed. Rep. 518).

The power and the duty of the court has been clearly defined and vigorously asserted by the Supreme Court of California, in the recent case (1946), of *In re Porterfield,* 28 Cal. (2d) 91, where, speaking at page 103, the court said:

> *"We unequivocably recognize and affirm that it is the duty of courts to be most vigilant and vigorous in protecting individuals, as well as minority and majority groups, against encroachment upon their fundamental liberties."*

We believe and urge that the opinion of the Honorable Circuit Court is subject to the criticism of the dissenting opinion in 87 Lawyers Edition, page 1442, where it is said that *"The opinion of the court cuts deeply into our judicial fabric. The duty of the judiciary is to exercise the jurisdiction which Congress has conferred."*

Your petitioners present to this Court, and file herewith, a duly certified transcript of the entire record of the case, as the same appears in the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of, and under the seal of this Court to the Circuit Court of Appeals for the Ninth Circuit, to the end that the judgment of said Circuit Court of Appeals for the said Circuit may be reviewed by this Honorable Court.

HENRY WALLACE WINCHESTER, ET AL.,
Petitioners;

By OLIVER O. CLARK,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 853.

HENRY WALLACE WINCHESTER, *et al.*,

Petitioners,

vs.

J. D. GREGG,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

J. D. Gregg, respondent herein, files herewith his brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause. The opinion of that Court, and its opinion upon the denial of a petition for rehearing are reported in 173 F. 2d 512.

I.

RESTATEMENT OF THE CASE.

Because of inaccuracies and omissions in petitioners' "Summary Statement," respondent deems it necessary to set forth a statement of the case.

The "Summary Statement," commencing on page 2 of the petition, purports to set forth certain "facts." These purported "facts" are nothing more than allegations of the complaint herein, which the record shows were found to be untrue by the findings of fact and conclusions of law and judgment made and entered by the trial court in an identical case tried in the Superior Court of the State of California, in and for the County of Los Angeles and affirmed on appeal. [Rec. Vol. II, pp. 404-457.]

Respondent is the owner of approximately 115 acres of land located near Roscoe in the San Fernando Valley and within the far-flung boundaries of the City of Los Angeles, California. This land has substantial value only for the excavation and production of rock, sand and gravel. [Rec. Vol. I, p. 301.] This is the property which is the subject matter of the within action. [Rec. Vol. I, p. 4.] Since the year 1934 respondent had been continuously operating a gravel pit and processing plant on adjoining property owned by him, on which the deposit of available materials is now exhausted. [Rec. Vol. I, pp. 274, 284, 285.] In order to continue the operation of his plant, it became necessary for respondent to seek an additional source of raw materials. This source was available on the 115 acres of immediately adjoining property owned by respondent.

On June 2, 1946, pursuant to the provisions of Section 12.24 of the Los Angeles Municipal Code, Ordinance

90,500 [Rec. Vol. I, pp. 162-165], respondent filed an application with the City Planning Commission of the City of Los Angeles requesting a "conditional use permit" authorizing him to use the property owned by him for the purpose of developing a natural resource, to-wit, to mine rock, sand and gravel. [Rec. Vol. I, p. 278.]

Thereafter and pursuant to the procedure prescribed by Section 12.32C of said Municipal Code [Rec. Vol. I, p. 190] a public hearing was had before the City Planning Commission. [Rec. Vol. I, pp. 278, 279, 280.] After the hearing the Commission denied the application. [Rec. Vol. I, p. 280.] Thereupon respondent herein appealed to the City Council from the Commission's order denying his application [Rec. Vol. I, pp. 280-281], pursuant to Sections 12.24C and 12.32E of said Municipal Code. [Rec. Vol. I, pp. 164, 165, 192.]

Upon such appeal the City Council referred the matter to its Planning Committee pursuant to Section 12.32E of the Code, and the Committee held a public hearing attended by about 250 persons, after which the Committee recommended to the Council that respondent's application be granted. [Rec. Vol. I, p. 281.] Thereafter, and on October 2, 1946, another public hearing was had before the City Council as a whole (although the Municipal Code did not require an additional hearing) which was attended by a large number of persons and both proponents and opponents were given full opportunity to be heard. At the conclusion of the hearing the City Council adopted the report of its planning committee and granted respondent the "conditional use permit" allowing him to excavate for rock, sand and gravel and to remove the same from the subject property upon certain prescribed conditions. [Rec. Vol. I, pp. 281-284.]

Thereupon, and pursuant to the terms of said permit, respondent commenced operations for the excavation and removal of rock, sand and gravel from said property. [Rec. Vol. I, p. 285.]

On November 22, 1946, twenty-six persons alleged to be the owners of property in the vicinity of the permit area, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled *Wheeler et al. v. Gregg et al.,* No. 522031. That complaint sought to enjoin Gregg from operating under the terms of said permit. The allegations of *that* complaint are substantially identical with the allegations of the complaint in equity filed in *this* proceeding. [Rec. Vol. I, pp. 2-59; Vol. I, p. 286; Vol. II, pp. 319-380.] It was prepared and filed by the same attorneys who represent petitioners in this proceeding and alleged that the suit was brought on behalf of the named plaintiffs and all others similarly situated [Rec. Vol. II, p. 369], which includes the petitioners herein.

A preliminary injunction was denied in that state court action [Rec. Vol. I, p. 286] and after a trial lasting from May 28, 1947, to September 10, 1947, a judgment was entered on September 10, 1947, in favor of defendant Gregg (respondent herein) denying plaintiffs the injunction and damages prayed for. [Rec. Vol. I, p. 287; Vol. II, pp. 458-461.] The judgment was supported by voluminous findings of fact and conclusions of law, whereby every material issue was determined against the plaintiffs, including a finding that the granting of the permit was not in violation of either the Constitution of the State of California or the Constitution of the United States, and that it was within the police power of the City of Los Angeles, and was not an "invasion of any personal or

property rights of said plaintiffs *or any other persons.*" (Emphasis added.) [Rec. Vol. II, p. 447.] A copy of the pleadings, findings and judgment in that case appears in the record herein. [Rec. Vol. II, pp. 319-461, incl.]

An appeal from *that* judgment was taken by the plaintiffs to the Supreme Court of the State of California. [Rec. Vol. II, pp. 462-463.] The California Supreme Court assigned the appeal for hearing before the District Court of Appeal of California, Second Appellate District. That court affirmed the judgment in favor of respondent Gregg on February 28, 1949. The opinion of that court is reported in Advance California Appellate Reports, 90 A. C. A. 420, and a copy is appended to this brief as an appendix.

Thereafter the District Court of Appeal of California denied a petition for a rehearing and a petition for a hearing in the Supreme Court of California, was denied on April 28, 1949.

The judgment in the state court in favor of respondent Gregg has now become final and the time within which to file a petition to the Supreme Court of the United States for a writ of certiorari to review the judgment of the state court expired on July 27, 1949. No such petition has been filed to the knowledge of respondent.

Meanwhile, on November 14, 1947, and while the state case was pending on appeal, this proceeding was commenced in the District Court of the United States, for the Southern District of California, Central Division, by certain named plaintiffs alleged to be the owners of property located in the vicinity of the Gregg permit area.

The allegations of the complaint herein are substantially identical with the complaint in the state case. [Rec. Vol. I, pp. 2-60; Vol. II, pp. 319-380.] Plaintiffs

in both the state case and in *this* case are represented by the same counsel. [Rec. Vol. I, p. 59; Vol. II, p. 379.] The complaint in the state case alleges that *that* action was brought on behalf of the named plaintiffs "and all others similarly situated on whose behalf this action is also begun and is maintained." [Rec. Vol. II, p. 351.]

The complaint in *this* federal case names all of the plaintiffs in *that* state case as owners of property in the vicinity of the Gregg land who are affected by the subject matter of this action. [Rec. Vol. I, pp. 40-44.]

The record in *this* case contains the uncontradicted affidavit of respondent Gregg:

> "That affiant is informed and believes and therefore alleges the fact to be that the real parties in interest in Superior Court Case No. 522031 and the real parties in interest in the within action No. 7765-PH are one and the same and that both of said actions have been and now are being prosecuted for the benefit of the same persons." [Rec. Vol. I, p. 287.]

Upon the commencement of this action, the District Court issued an *ex parte* temporary restraining order enjoining Gregg from conducting operations on his property. Respondent Gregg filed motions to dismiss and to dissolve the restraining order and in opposition to a preliminary injunction, supported by affidavits and a memorandum of points and authorities. [Rec. Vol. I, pp. 268-312; Vol. II, pp. 313-566; Vol. II, p. 583.]

After a hearing the District Court issued a preliminary injunction enjoining respondent Gregg from operating his properties and denied the motion to dismiss. [Rec. Vol. II, p. 619.]

The District Court also made an "order" that the operation of the injunction and all other proceedings in this case be stayed pending a final decision in the state case provided Gregg file a $50,000 bond.

Defendant Gregg (respondent herein) appealed to the United States Court of Appeals for the Ninth Circuit from the order of the District Court granting the preliminary injunction. The United States Court of Appeals reversed the order of the District Court granting the preliminary injunction and remanded the cause to the District Court with instructions to dismiss the action.

The *state* action and *this* action are both class or representative suits; both actions being ***in rem*** or ***quasi in rem*** and the plaintiffs in both cases are persons of the same class and affected in like manner by the subject matter of the actions. Both actions involve identical issues and subject matter and the judgment in the prior state case is binding upon the petitioners in this case. The United States Court of Appeals, however, did not rest its decision solely upon that premise but also relied upon the doctrine of comity and the provision of Section 265 of the Judicial Code (28 U. S. C. A. 379) as is shown by its opinoin in chief and its opinion on denial of a rehearing. (173 F. 2d 512.)

II.
ARGUMENT.

Summary of Argument.

POINT A. The petition here should be dismissed because no substantial federal question is presented.

1. Plaintiffs' complaint is based on an anticipated impairment of the enjoyment of their respective homes and properties by reason of anticipated noise, dust and trespass by erosion. The gist of the action is an anticipated nuisance and an anticipated trespass which it is alleged will necessarily result from respondent's operations.

2. The anticipated encroachment by erosion, assuming that there will be such, will not affect petitioner's properties and will be so remote in point of time that there is and can be no present taking of property within the purview of the Fourteenth Amendment of the Constitution of the United States.

3. The anticipated damage from noise and dust would be incidental and consequential and there is no taking of property involved.

4. Any anticipated injury to petitioners or their property would arise from the operations of Gregg and not by reason of any State action within the purview of the Fourteenth Amendment.

5. Petitioners have no vested rights in the maintenance of zoning regulations of Gregg's property.

6. Petitioners cannot assert rights growing out of a zoning ordinance of the City of Los Angeles and at the same time and in the same proceeding attack the ordinance.

7. The business of excavating rock, sand and gravel by an owner from his own lands is a lawful and useful occupation and cannot be prohibited by legislation except in cases where the enactment of such legislation may be found necessary for the protection of the legal rights of others, which is not the case here.

8. Petitioners' authorities do not support their contentions. On pages 10 and 11 of the petition cases are cited in support of federal jurisdiction. Most of these cases are not relevant and where they are relevant they support respondent's position and not that of petitioners.

9. The meaning and effect of the permit granted Gregg by the City of Los Angeles are questions of local law and this court will usually accept the determination of state courts on questions of this kind, and should do so in this case.

POINT B. Contrary to petitioners' contentions it is not the settled law of California that a judgment in a class action binds only those who actually join in the action or accept its benefits. California follows the general rule with respect to the effect of judgments in class actions.

POINT C. Other points in the petition are fully covered in the opinion and supplemental opinion of the United States Court of Appeals.

POINT A.

The Petition Here Should Be Dismissed Because No Substantial Federal Question Is Presented.

1. Plaintiffs' complaint is based on an anticipated impairment of the enjoyment of their respective homes and properties by reason of anticipated noise, dust and trespass by erosion. The gist of the action is an anticipated nuisance and an anticipated trespass which it is alleged will necessarily result from respondent's operations. The complaint alleges that any operation in the excavation of rock, sand and gravel on a commercial scale within or upon respondent's property would frequently, almost daily, pollute the air with dust and dirt, and that said dust and dirt in substantial and obnoxious quantities would be carried by winds to the properties of plaintiffs and of others similarly situated in the neighborhood and would be deposited upon said properties and in the homes and upon the persons of plaintiffs and of others similarly situated, and that such pollution of the air and deposits of dust and dirt is a natural and a necessary consequence of any excavation within and upon said lands, which for convenience we shall hereinafter call the "permit area." [Rec. Vol. I, pp. 36-37.] It is further alleged that the crushing of rock in the permit area will produce loud, crunching, rasping and obnoxious noises [Rec. Vol. I, pp. 51-52] and that the structure and placement of the materials in the permit area "are such that it is a reasonable probability and expectancy that *in the course of time,* by natural processes of erosion, the side walls of such a pit, at their upper surface, will recede until a slope of not less than one and one-half feet horizontally for each vertical foot of depth has been uniformly attained, and nu-

merous gulleys of a depth of from one to twenty, or more, feet, will be eroded and extended outwardly from said pit a distance of 200 feet, or more, and that said banks and gulleys would substantially encroach, in the course of time, upon said public streets, and upon the lands which now bound" the permit area, "and upon the lands abutting upon streets opposite the lands" which comprise said permit area. [Rec. Vol. I, pp. 35-36.]

It is clear, we think, that the gist of this action is to enjoin an anticipated nuisance and an anticipated trespass by erosion. The following from the opinion in *Wheeler v. Gregg* (see appendix) is pertinent here, since the complaint in that case and the complaint in the present case are practically identical.

> "The appellants next contend that in this action in equity they are entitled to an injunction to prevent a threatened interference with their constitutional right to own and enjoy their property. Although not specifically stated in appellants' briefs, an examination of the pleadings coupled with the arguments advanced in their briefs leads us to the conclusion that appellants seek to enjoin respondent Gregg's operations as an anticipated nuisance. When viewed in the light of the conditions imposed by the City Council in granting the conditional use permit and the additional conditions imposed by the trial court in its judgment, we are persuaded that the conduct of respondent Gregg's operations, subject to the foregoing conditions imposed thereon, justified the conclusion of the trial court that the same would not result in any substantial injury to appellants nor to the ownership or enjoyment of their property."

2. The anticipated encroachment by erosion, assuming that there will be such, will not affect petitioners' properties and will be so remote in point of time that there is and can be no present taking of property within the purview of the Fourteenth Amendment of the Constitution of the United States.

In *Wheeler v. Gregg* the state court found that the structure or placement of the materials composing the permit area are not such that there is a reasonable probability or expectancy that in the course of time, by natural processes of erosion or otherwise, the side walls of a pit on such property would recede so that the pit would substantially or at all encroach upon any public streets or upon any of the lands which now bound the permit area or upon lands abutting upon streets opposite the lands comprising said area, or upon any other lands. [Rec. Vol. I, pp. 440-441.] But if we assume, as alleged in the complaint, that *in the course of time* there would be erosion which would extend beyond the boundaries of the permit area, the complaint does not allege that the properties of any of the petitioners are within the area which will be affected. Furthermore, if, in the course of time, erosion should occur extending beyond the boundaries of the permit area, the effects thereof would be first felt on public streets which intervene between the permit area and petitioners' properties and it is not to be supposed that the City of Los Angeles under such circumstances would not take the required preventive measures to insure the maintenance of its streets. Any possible injury to petitioners' property would be temporary and fully compensable in damages.

It is the law of California, as it is generally, that if a loss in market value of property is claimed, such loss must flow from the taking of the property complained of. Damages which are speculative, remote, imaginary, or merely possible, or recovery in advance for torts or other injuries that may or may not be committed, cannot serve as a legal basis for recovery. *Arnerich v. Almaden Vineyards Corp.*, 52 Cal. App. 2d 265, 272.

In *Gas & Electric Co. v. Miller & Lux, Inc.*, 118 Cal. App. 140, 144, an eminent domain proceeding, the court said:

> "The rule is that severance damage must be based upon some real physical disturbance of a property right which naturally tends to and actually does decrease the market value and that mere fears of remote or contingent possibilities of damage are not sufficient. (Eachus v. Los Angeles Consol. Elec. Ry. Co., 103 Cal. 614 [42 Am. St. Rep. 149, 37 Pac. 750]; Illinois Power & Light Corp. v. Peterson, 322 Ill. 342 [49 A. L. R. 692, 153 N. E. 577]; Illinois Power & Light Corp. v. Cooper, 322 Ill. 11 [152 N. E. 491]; Alabama Power Co. v. Keystone Lime Co., 191 Ala. 58 [67 South. 833]; Central Georgia Power Co. v. Mays, 137 Ga. 120 [72 S. E. 900]; Yazoo & M. V. R. Co. v. Jennings, 90 Miss. 93 [122 Am. St. Rep. 312, 43 South. 469].)"

3. The anticipated damage from noise and dust would be incidental and consequential and there is no taking of property involved.

The dust and noise which petitioners anticipate as a necessary concomitant of respondent's operations at most might be grounds for the recovery of damages under the

provisions of the Constitution of the State of California and similar provisions in the constitutions of other states. But even this is doubtful, since such incidental and consequential injuries and damage are only those common to the public generally, although perhaps greater in degree. Such injuries and damage are *damnum absque injuria.*

But while there might be grounds for the recovery of damages under the California Constitution providing that "private property shall not be * * * damaged for public use without just compensation having been first made * * * to the owner" (Article I, Section 14), there would be no *taking* of property within either the state or federal constitution.

Applicable here is the ruling in *Richards v. Washington Terminal Co.,* 233 U. S. 546. (See also: *Mayor and City of Baltimore v. Himmelfarb* (Md.), 192 Atl. 595; *Gilmore v. Central Maine Power Co.* (Me.), 145 Atl. 137; *Thompton v. Kimball* (C. C. A. 8—1948), 165 F. 2d 677.)

4. Any anticipated injury to petitioners or their property would arise from the operations of Gregg and not by reason of any state action within the purview of the Fourteenth Amendment.

Gregg's right to excavate and remove rock, sand and gravel from land owned by him stems from his ownership, and not from a municipal grant. As this court said in *Gully v. First National Bank,* 299 U. S. 109, 116:

> "The argument for the respondent proceeds on the assumption that because permission at times is preliminary to action the two are to be classed as one. But the assumption will not stand. A suit does not

arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail."

Gregg's inherent right to excavate and remove rock aggregates from his own land was temporarily suspended by zoning ordinances of the City of Los Angeles, of which Ordinance 90500, adopted March, 1946 [Rec. Vol. I, p. 264], is current. See especially Section 12.07 of this ordinance. [Rec. Vol. I, pp. 81-86.] But this ordinance expressly recognizes the propriety of lifting the suspension where the development of natural resources is deemed essential or desirable to the public convenience or welfare and is in harmony with the various elements or objectives of the Master Plan [Ordinance 90500, Sec. 12.24; Rec. Vol. I, p. 163], subject to the imposition of such conditions as are deemed necessary to protect the best interests of the surrounding property or neighborhood and the Master Plan. [Rec. Vol. I, p. 165.]

The City Council found that the proposed use of the subject property is deemed essential to the public convenience and welfare and is in harmony with the various elements or objectives of the Master Plan. [Rec. Vol. I, p. 564.]

The conditional use permit granted Gregg by the City of Los Angeles lifted this suspension and imposed stringent conditions for the protection of neighboring properties and of the public. [Rec. Vol. I, pp. 564-565.] To these, additional conditions were imposed by the state court in *Wheeler v. Gregg* (see appendix).

The suspension having been lifted, petitioners' rights as against Gregg's operations are precisely the same as they

would have been had no zoning ordinance ever been adopted. But petitioners contend in effect that governmental authority in zoning is exhausted by its exercise. This is not the law.

The act of the City Council of the City of Los Angeles in granting Gregg a permit did not *create* a new right in Gregg. It merely removed an *artificial impediment* to the exercise of a right already possessed. By granting the permit the City simply surrendered any right that it might have to object. If Gregg had not applied for a permit, but had simply commenced operations, no federal question would have been involved; neither is it now involved.

The permit granted Gregg by the City of Los Angeles could not and does not authorize him to create or maintain a nuisance, or permit his operations to encroach on neighboring property. Hence, any damage which petitioners may suffer by reason of an encroachment, dust or noise, does not arise from the permit.

So it has been held that the mere threat or possibility of a construction of a public work is not actionable.

> "In a case involving a contemplated or future possible change of grade (Eachus v. Los Angeles etc. Ry. Co., 103 Cal. App. 614, at pp. 621-622; 37 Pac. 750, 42 Am. St. Rep. 149), this court held that until there was a change in the physical condition of the street, the plaintiff was not damaged, notwithstanding the fact that an ordinance had theretofore been passed authorizing a change of grade." (*Heimann v. City of Los Angeles,* 30 Cal. 2d 746, 754.)

5. Petitioners have no vested rights in the maintenance of zoning regulations of Gregg's property. (*Reichelderfer v. Quinn,* 287 U. S. 315; *Eggeben v. Sonnenberg* (Wis.), 1 N. W. 2d 84; *Marblehead Land Co. v. Los Angeles,* 36 F. 2d 242, 47 F. 2d 528 (C. C. A. 9, Cert. denied 284 U. S. 634); *Clifton Hills Realty Co. v. Cincinnati,* 60 Ohio App. 443, 21 N. E. 2d 993; *Chayt v. Maryland Jockey Club* (Md.), 18 A. 2d 856; *People ex rel. Miller v. Gill,* 389 Ill. 394, 59 N. E. 2d 671; *Jardine v. City of Pasadena,* 199 Cal. 64, 74; *Holleran v. Silverman,* 338 Pa. 345, 12 A. 2d 292; *Miller v. Board of Public Works,* 195 Cal. 477; *Zahn v. Board of Public Works,* 195 Cal. 497, 512; *Acker v. Baldwin,* 18 Cal. 2d 341, 345.)

The failure of a municipality to place restraint upon the use of certain property, or its refusal to do so, does not constitute an improper exercise of the police power. It cannot be forced to impose restrictions on the use of property. Failure to act might render invalid restrictions placed on neighboring property, but a neighbor has no right to require the municipality to restrict adjacent land in which he has no ownership.

6. Petitioners cannot assert rights growing out of a zoning ordinance of the City of Los Angeles and at the same time and in the same proceeding attack the ordinance. (*Hurley v. Commission of Fisheries of Virginia,* 257 U. S. 223.)

7. The business of excavating rock, sand and gravel by an owner from his own lands is a lawful and useful occu-

pation and cannot be prohibited by legislation except in cases where the enactment of such legislation may be found necessary for the protection of the legal rights of others, which is not the case here. (*People v. Hawley,* 207 Cal. 295; *In re Kelso,* 147 Cal. 609; *In re Throop,* 169 Cal. 93; *Wheeler v. Gregg, supra* (see appendix).)

8. Petitioners' authorities do not support their contentions. On pages 10 and 11 of the petition cases are cited in support of federal jurisdiction. Most of these cases are not relevant and where they are relevant they support respondent's position and not that of petitioners.

Home Telephone Co. v. City of Los Angeles, 227 U. S. 278, was a suit to enjoin the putting into effect of the city ordinance establishing telephone rates alleged to be confiscatory.

Raymond v. Chicago Traction Co., 207 U. S. 20, concerned the repugnancy to the Fourteenth Amendment of a reassessment made by a State Board of Equalization.

Ex parte Young, 209 U. S. 123, in its ultimate aspect concerned the power of the federal courts to prevent the enforcement of railroad rates which were confiscatory.

Snowden v. Hughes, 321 U. S. 1, affirmed the dismissal of a suit to recover damages for an alleged violation of plaintiff's civil rights.

Mugler v. Kansas, 123 U. S. 623, upheld the validity of state liquor laws.

Crowell v. Benson, 285 U. S. 22, upheld the validity of an award of damages under a federal statute.

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, upheld the action of a Pennsylvania court denying an injunction to restrain the mining of coal under certain land and held invalid a Pennsylvania statute which deprived the owner of the reserved right under a deed to remove coal underlying the property conveyed. This court held the statute invalid as taking property without due process of law.

In the course of his opinion, Mr. Justice Holmes, speaking for the majority of the court, said, "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." Compare this statement with the language of the opinion in *Wheeler v. Gregg, supra* (see appendix), with reference to Gregg's right to remove rock, sand and gravel from his own property.

The inapplicability of *Times-Mirror Co. v. City of Los Angeles,* 3 Cal. 2d 309, is pointed out in the opinion in *Wheeler v. Gregg, supra.*

The cases of *Dobbins v. City of Los Angeles,* 195 U. S. 223, and *Jardine v. City of Pasadena,* 199 Cal. 64, support our position, not that of petitioners.

9. The meaning and effect of the permit granted Gregg by the City of Los Angeles are questions of local law and this court will usually accept the determination of state courts on questions of this kind, and should do so in this case. (*Maguire v. Reardon,* 255 U. S. 271, 273.)

POINT B.

Contrary to Petitioners' Contentions, It Is Not the Settled Law of California That a Judgment in a Class Action Binds Only Those Who Actually Join in the Action or Accept Its Benefits. California Follows the General Rule With Respect to the Effect of Judgments in Class Actions.

Petitioners rely on *In re Central Irrigation District,* 117 Cal. 382, 388; *Haese v. Heitzig,* 159 Cal. 569, 573, 574; *Compton v. Jessup,* 68 Fed. 263; *Ex parte Howard,* 9 Wall. 175, and certain passages from Freeman on Judgments, which so far as they relate to California are predicated on the language of the opinion in *Haese v. Heitzig, supra* (Pet. p. 12).

Respecting the *Central Irrigation District* case, the Supreme Court of California, in *Price v. Sixth District Agricultural Assn.,* 201 Cal. 502, 516, said:

> "In the case of In re Central Irr. Dist., 117 Cal. 382 (49 Pac. 354), the statement made is *obiter,* and moreover the doctrine of the law of the case is there confused with the doctrine of estoppel by judgment. Furthermore that case is not followed in any of the later cases on this subject."

The *Haese* case was one to quiet title to a quarter section of land. The defendant successfully claimed under a sale for non-payment of state and county taxes and a sale for non-payment of an assessment levied against the land by the Tulare Irrigation District. Plaintiff, the appellant, asserted that defendant was estopped by two prior judg-

ments, one of which was an action brought by one Jauchius on behalf of himself and all others similarly situated, as taxpayers of the district, to set aside an assessment levied four years prior to the assessment which resulted in the sale to defendant, that the bonds of the district be declared not an outstanding indebtedness and that the organization of the district be annulled. Judgment went in favor of plaintiff, Jauchius, by default, and in the *Haese* case it was asserted by plaintiff that this judgment operated as an estoppel against Heitzig on the ground that he, as an owner and taxpayer in the district, was interested in the Jauchius action and that it was brought on his behalf. It was in reference to this unusual set of facts that the Supreme Court of California reached the conclusion which it did in the *Haese* case. So far as we can learn, this case has not been cited in any later decision to this particular point.

Later cases conform to the general rule thus stated in the latest decision of the Supreme Court of California considering this subject:

> "In cases properly falling within the category of representative litigation, the judgment or decree would be *res judicata for or against* the class sought to be represented (Freeman on Judgment (5th Edition), section 426, page 952; Price v. Sixth District Agricultural Assn., 201 Cal. 502, 513 (258 Pac. 387).)" (Emphasis added.)
>
> *Weaver v. Pasadena Tournament of Roses,* 32 Cal. 2d 833, 834.

In the *Weaver* case the Supreme Court of California has met and answered the criticism which Freeman very properly directs to the holding in *Haese v. Heitzig, supra,* and similar holdings, to-wit, that they involve a violation of the principle of mutuality in the estoppel (1 Freeman on Judgments, 5th Edition, p. 956, sec. 436a).

Petitioners are relying on a doctrine which, if it ever existed as a rule of general application in California, is no longer the law of that state.

Since we are concerned only with the rule in California, it is unnecessary to consider what the rule is, or once was, in Iowa (*Ex parte Howard, supra*), or in Indiana or Ohio (*Compton v. Jessup, supra*).

POINT C.

Other Points in the Petition Are Fully Covered in the Opinion and Supplemental Opinion of the United States Court of Appeals for the Ninth Circuit. (Rep. 173 F. 2d 512.)

Pertinent here is the case of *Rodman v. Rogers* (C. C. A. 6), 109 F. 2d 520. In that case a group of property owners brought suit in the state court in Kentucky to enjoin the operations of a rock quarry. The state court granted a limited injunction, restricting the operations but not prohibiting them. Thereafter a different set of property owners filed an action in the United States District Court, the complaint containing substantially the same allegations as in the state court. The District Court sustained defendant's plea that the injunction in the state case was *res judicata* as to all matters raised by appellants. This was affirmed by the United States Court of Appeals for the Sixth Circuit. The court said:

> "Nor is it of consequence as contended by Appellants, that none of the nominal parties plaintiff in the first suit is a plaintiff herein. When property owners are similarly injured by a nuisance, they constitute a class, and, if one or more of them is designated to act for the class in bringing a suit to abate the nuisance, a judgment rendered therein is binding upon the class."

Also pertinent is a recent decision of this court in *Stainback v. Mo Hock Ke Lok Po,* decided March 14, 1949, and reported in 69 S. Ct. 606, 614, in which this court stated:

> "Entirely aside from the question of the propriety of an injunction in any court, territorial like state

courts are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction. We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course."

CONCLUSION.

We respectfully submit that there is no substantial federal question involved in this case, but that the questions involved are of a local nature, and that petitioners have had their day in court in the state case in which a decree against them has become final.

It is submitted that this case is not a proper one for review by certiorari in this court and that the petition for a writ of certiorari should be denied.

Dated: September 30, 1949.

Respectfully submitted,

GUY RICHARDS CRUMP,
Counsel for Respondent.

APPENDIX.

Opinion of the District Court of Appeal.

[Civ. No. 16444. Second Dist., Div. One. Feb. 28, 1949.]

Jackson Earl Wheeler *et al.*, Appellants, v. J. D. Gregg, *et al.*, Respondents.

Appeal from a judgment of the Superior Court of Los Angeles County. Alfred L. Bartlett, Judge. Affirmed.

Action for a judgment declaring void a variance permit granted one defendant by defendant city, and for injunctive and other relief. Judgment for defendants affirmed.

Oliver O. Clark and Robert A. Smith for Appellants.

Ray L. Chesebro, City Attorney, Roger Arnebergh, Assistant City Attorney, Thomas H. Hearn, Deputy City Attorney, Donald J. Dunne and Guy Richards Crump for Respondents.

WHITE, *J.*—Plaintiffs herein, numbering 25 individual and one corporate property owners whose properties lie within 3,000 feet of 115 acres of land owned or leased by defendant Gregg, instituted this action to have declared unconstitutional and void the action of the council of the city of Los Angeles whereby, on October 2, 1946, said council granted to defendant Gregg a variance permit (in reality a conditional use permit under section 12.24 of Ordinance No. 90500) to excavate for the commercial production of rock, sand and gravel in an area of land containing some 105 acres. Plaintiffs alleged that the action was also brought in behalf of the planning commission, park department, playground and recreational department and board of education of defendant city. They also alleged that their action was prosecuted for the benefit of more than one thousand persons living within what plaintiffs described as "the community area," alleging that

"the situation of said agencies is similar to the situation of these named plaintiffs in respect to their own properties," and that with reference to the aforesaid more than one thousand persons, the enjoyment of their homes within said "community area" and their health and safety "would be substantially, materially, and injuriously affected in kind substantially as would be these named plaintiffs" from defendant Gregg's operations in the area in question.

By their complaint, plaintiffs sought a decree:

(1) Declaring void a variance permit (really, as stated above, a conditional use permit) granted defendant Gregg by defendant city by which Gregg was authorized to excavate and remove rock, sand and gravel from the permit area;

(2) Enjoining the city from granting any permit for the commercial production of rock, sand and gravel from any lands included within the so-called community area;

(3) Enjoining defendant Gregg from (a) exercising any right, benefit or privilege under the permit granted him by the city, and (b) from conducting any operation for the commercial production of rock, sand and gravel within the so-called community area;

(4) As against defendant Gregg the recovery of actual damages "accrued" to the date of judgment, together with $250,000 punitive damages;

(5) General relief.

Defendants filed separate answers each denying the material allegations of the complaint. Following trial the court rendered judgment for defendants, but in so doing required defendant Gregg to comply with certain operational conditions imposed by its decree, in addition to the conditions imposed by the city in its permit.

The conditions imposed by defendant city were:

"1. That the applicant (Gregg) construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence, providing the Fire Department grants permission for same.

"2. That no permanent plant, building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now operated by applicant, lying southwesterly of said boulevard and processed at said plant.

"3. That a set-back line of 50 feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

"4. That the area between all property lines or street lines and 50 foot set-back be screen planted progressively as excavations proceed."

To the foregoing conditions the court added the following:

"1. That defendant John D. Gregg shall not conduct any operation for the excavation of rock, sand or gravel from the so-called 'Critical' area, as described in the complaint herein, lying northeasterly of Glenoaks Boulevard at any time before 6:00 o'clock A. M. of any day, or after 8:00 o'clock P. M. of any day, excepting that the said defendant John D. Gregg shall not be prohibited from making any reasonable or necessary repairs to equipment in said area during other hours.

"2. That said defendant John D. Gregg house in any primary crusher which is operated in that portion of the

so-called 'Critical' area lying northeasterly of Glenoaks Boulevard so as to minimize any noise emanating therefrom.

"3. That in connection with any and all drag-line operations on the banks or slopes of any pit excavated by defendant John D. Gregg in that part of the so-called 'Critical' area lying northeasterly of Glenoaks Boulevard, that the said defendant John D. Gregg shall cause the banks or slopes of said excavation to be sprinkled with water prior to any such drag-line operations, so as to minimize the possibility of dust from any such operation being carried by the winds beyond the boundaries of said so-called 'Critical' area.

"4. That said defendant John D. Gregg, as soon as reasonably practicable and as soon as material and equipment is available, shall complete the construction of the dust collection system in his rock crusher plant located southwesterly of Glenoaks Boulevard, the construction of which system was commenced prior to the commencement of this action."

With reference to the physical characteristics of the area involved, there was testimony that the soil in what we shall designate as the "permit area" consists of quite a range in sizes of soil particles from large rocks down to some fine silt. It is not uniform either in the vertical horizon or laterally. It has been laid down by rather fast-moving water, and as the streams have changed directions and changed velocities they have deposited in a rather heterogeneous manner various particles in rather close areas, so that there is no one property that has a uniform type of soil. It is what is termed gravelly soil. In some places there are soils having a sufficiently fine

deposit to be termed a sandy loam. There are some small parcels or portions that could be called gravelly loam, but, for the most part it is a gravelly soil; that "The permit area is cut up by stream beds. It is badly eroded by what we term flood erosion due to the surface flows following flash floods, so that there are many small depressions due to that. The difference in elevation will vary two or three feet in very short distances in many places, in some places the depth of these washes and depressions is as much as five or six feet; there are one or two pronounced ridges, and the topography is so uneven that at the present time no agricultural work could be carried on without levelling. If it were to be laid out for an irrigation system in which pipelines are used and the furrow method is employed, it would be necessary to do very extensive, a very extensive amount of grading. If a sprinkling system was used a less amount of grading would be required, however there would be a considerable amount necessary even in the event a sprinkling system was used." That from the standpoint of farming, "no part" of the permit area "has any agricultural value whatever."

Although residences could be and have been constructed in the permit area, there was substantial evidence that, "As regards the permit area, I believe the most profitable use to which that property can be put is for the extraction of rock, sand. and gravel. The highest and best use means the highest, best and most profitable. The word 'profitable' is commonly connected with the highest and best, and means that use which will produce the highest rental value or leasehold value or market value of the fee"; that the highest and best use of the entire area including the permit area, is "to develop the natural resources that exist upon it," namely, rock and sand. There was also evidence

showing the proximity of the permit area to numerous gravel pits, both operating and abandoned, rubbish dumps, a winery and other industrial uses.

There was also testimony given by qualified experts that none of plaintiffs' properties were adversely affected "value-wise," by reason of the action of the city council in granting the conditional use permit to defendant Gregg. That the depreciation in value of the properties since October 1, 1946, was due to the general decline in the values of real estate in the Los Angeles area in general and in the area district here in question in particular. That the decline in values in the San Fernando Valley is comparable to the decline in such values throughout Los Angeles County and the United States since October 1, 1946, the date of the permit here challenged.

Plaintiffs presented evidence that in 1914 the lands here in question were subdivided for residential-agricultural use and were by deed restrictions limited to such use for the ensuing 20 years. That thereupon these lands were offered for sale and a considerable amount thereof was sold and developed for residential uses. That in 1914 the area here in question, then known as a part of Hansen Heights, was annexed to the city of Los Angeles; that in 1919, the residents of that area, in conjunction with those of a larger area, organized Municipal Improvement District No. 9 and bonded their properties for $150,000 to obtain, and assure, an adequate water supply for this area; that in July, 1925, nearly nine years before the expiration of the aforesaid deed restrictions, the defendant city enacted its Zoning Ordinance No. 52421, by which this community area was declared to be a residential area, and from which the mining of rock aggregates was excluded; that in June, 1926; May, 1927; August 15, 1927; and August

27, 1927, by its enactment of ordinances numbered respectively 55129, 57958, 58624 and 58375, defendant city reaffirmed its zoning classification of this community area as a residential area, and its exclusion therefrom of the business of mining rock aggregates; that in June, 1926, and in June, 1928, upon petition of the people, defendant city consummated proceedings for the concrete paving of about 7½ miles of the public streets within said area, and assessed the costs of said improvement upon the lands within said area; that in 1928, upon petition of the people, the defendant city consummated proceedings for the organization of Municipal Improvement District No. 57, and the acquisition and improvement of a 15-acre public park and recreation center, on the westerly side of Wicks Avenue, immediately southerly of Dronfield Avenue, in said community area, and bonded the property within said community area for the payment of its cost; that in June, 1930; February, 1933; September, 1934 and November, 1936, defendant city by its enactment of ordinances numbered, respectively, 66750; 72327; 74140, and 77000 reaffirmed its zoning classification of this community area as a residential area, and its exclusion therefrom of the business of mining rock aggregates; that in August, 1934; July 7th, 1936; July 21st, 1936; July 7th, 1939, and January, 1940, the city planning commission reaffirmed its zoning classification of this community, by denying five separate applications for permission to mine rock aggregates within this community area. Two of these applications were denied, upon appeal, by the city council. Three of these applications involved land covered by the permit challenged here. That in 1942, upon petition of the people, the Remsen Avenue school, located about one-half mile westerly of this community area, and about 900 feet from

a potential rock excavation operation, was abandoned, and as a replacement therefor, the Stonehurst school was established within this community area about 600 feet from the area covered by the permit under challenge herein; that in 1944 the city began, and continued through 1945, and until March 7th, 1946, a comprehensive survey and study of zoning conditions, and on that date, March 7th, 1946, it enacted its comprehensive zoning ordinance, No. 90500, which became effective June 1st, 1946. That by this ordinance, the city reaffirmed its classification of this community area as a residential area, and its exclusion therefrom of the business of mining rock aggregates, upon the following stated grounds: (1) the continuance of such restriction was "necessary in order to encourage the most appropriate use of land; to conserve and stabilize the value of property; to provide adequate open spaces for light and air; . . . to facilitate adequate provisions for community utilities and facilities such as, transportation, water, sewage, schools, parks and other public requirements, and to promote health, safety and the general welfare, all in accordance with a comprehensive plan"; that during the 32-year period from 1914 (the year of the deed restrictions), to October 2d, 1946 (the date of the permit challenged here), this community area, of less than one and one-half square miles, was improved with (1) more than 360 homes occupied by more than 1,750 persons of whom more than 350 were children under the age of 16 years; (2) two churches, attended by more than 300 persons each Sunday; (3) a kindergarten and elementary grade school attended by 418 pupils; (4) a public park and recreation center attended by more than 200 persons each day, and 2,000 persons each week, many of whom are children under the age of 6 years, who unattended, patron-

ize the facilities of said recreation center, and for which the city expends about $6,000 annually for its supervised recreational facilities at this park; (5) a city fire department which in efficiency is about four times greater than that required by the National Fire Underwriters Board; an American Legion hall adequate for the needs of a membership of 118, and a medical clinic; that during the two and one-half years immediately preceding October 2d, 1946, 14 of the named plaintiffs, at a cost to them of more than $150,000, purchased and improved their home properties which lie either immediately adjoining the critical area involved here, or immediately across a 40-foot street from said critical area. In their purchase of these homes many of these purchasers first inquired of the city as to the zoning restrictions, and were told by the city that this area was zoned for residential use, and that several applications for permission to excavate rock aggregates in this community area had been denied by the city. These persons testified that they would not have purchased or improved these properties had they known there was any probability of permission being granted to excavate within this area for the production of rock aggregates; that in 1946, the assessed value of the land and improvements in private ownership within this community area of 1½ square miles, was about $500,000—an increase of about $150,000 over the preceding year. That the lands which comprise the critical area involved here have a reasonable market value of $2,500 per acre, if permission to produce rock aggregates therefrom is denied; that the defendant Gregg paid for the 105 acres of land covered by this permit during the five years immediately preceding October 2d, 1946, an aggregate sum of about $75,000. That there is, and was during the year 1946, preceding October 2d, a substantial demand for the

land which comprises said critical area, for development and use for residential purposes, and that said land is reasonably adapted to that use; that during this 32-year period of residential classification, development, use and protection against the invasion by the rock industry, no disturbing change in conditions has occurred within this community area.

What is termed the "permit" area is bounded on the west by Wicks Street, a dusty unimproved road, on the northeast by Dronfield and by Art Street (unpaved), Lot 23 of Block 17 and Lot 9 of Block 19, on the southeast by Peoria Street (which is paved), Lots 8, 11, 12, 15, 16, 17 and 18 in Block 19, and by Pendleton Street, which is not paved. What is referred to as the "community" area surrounds the "permit" area. Maps of these areas were introduced into evidence at the trial and are before us on this appeal. We will not attempt to delineate their boundaries in detail. With reference to the "community" area, suffice it to say that it encompasses a general area surrounding the "permit" area, including distances of from some 250 feet to 3,000 feet from the boundaries of the "permit" area. It is noteworthy that the varying distances at which the boundaries of the "community" area are drawn from the boundaries of the "permit" area serves to exclude existing gravel pits and other industrial uses inconsistent with the theory of a strictly residential district.

From a perusal of the voluminous record herein consisting of a reporter's transcript containing 5,082 pages of testimony, a clerk's transcript of 174 pages, 288 exhibits and 67 numbered paragraphs of findings, we deem it a fair statement to say that prior to June 1, 1946, the city of Los Angeles had no comprehensive zoning ordinance, rather, there existed a series of heterogeneous zon-

ing ordinances applicable to various parts of the municipality and which, as testimony in this case indicates, were considered as stopgap ordinances to be eventually absorbed by a single comprehensive zoning ordinance. Contained in all of these ordinances were provisions for exceptions, and many were granted.

The first comprehensive zoning ordinance and the one with which we are here concerned, was adopted and became effective June 1, 1946, being Ordinance No. 90500 of defendant city. The record reflects that during the period of more than a year prior to its adoption while surveys were being made and the ordinance was in process of preparation, defendant Gregg's property, which is the subject of this appeal, was shown on the tentative zoning map as M-3, which would permit the excavation of rock thereon. However, when the ordinance was finally adopted by the city council it absolutely classified defendant Gregg's property in an R-A zone, which permitted residential and agricultural uses and excluded the excavation of rock, sand or gravel.

However, the ordinance as adopted, provided for the granting of variances from its existing provisions. Also, section 12.24 of said ordinance provided for the granting of conditional use permits by the planning commission or the city council to permit certain uses, of public concern, in zones from which such uses would otherwise be excluded, when it be found that such uses are deemed essential or desirable to the public convenience or welfare. We find included in such permitted uses, of public concern, the "development of natural resources."

Shortly after the effective date of the foregoing ordinance, defendant Gregg, pursuant to the provisions of section 12.24 thereof, applied to the planning commission of defendant city for a permit to excavate about 105

acres of the property owned by him, for the development of the natural resources on his property, namely rock, sand and gravel. On July 26, 1947, said planning commission denied defendant Gregg's application upon the grounds (1) that an excavation for the commercial production of rock, sand, and gravel, was not the highest and best use of said land; (2) that said property is adapted to residential development and use; (3) that the "RA" zoning then upon said property, was appropriate for said property, and for that general area, as evidenced by the residential development in that immediate neighborhood; (4) that the pit which would be left after the excavation was completed, would create an unsightly and dangerous condition, detrimental to the public welfare and safety, and would leave the land in a condition unsuited for use in keeping with others in that community; (5) that the creation of such a condition would adversely affect individual property rights, and would interfere with the normal growth of that community, and (6) would conflict with the objectives of the city's master plan of zoning.

Thereupon, defendant Gregg, in accordance with further provisions of the ordinance, appealed to the city council from the adverse ruling by the city planning commission. The exhibits on file demonstrate that the claimed merits and demerits of defendant Gregg's application were presented both to the city planning commission and to the city council in detail, and afforded both of these bodies ample evidence upon which to arrive at an informed opinion and conclusion.

A public hearing on defendant Gregg's application was first conducted before the planning committee of the city council and later before the council itself. Both the proponent and the protestants were allowed approximately the same time, "between an hour and an hour and a half"

before the planning committee of the city council, at which many witnesses were heard. When the report of that committee was submitted to the council as a whole, another public hearing was held, at which the protestants requested one hour in which to present their claims. However, the president of the council ruled that each side should have 30 minutes. Following this hearing, the city council voted to grant the application of defendant Gregg. The instant action ensued, and from the judgment therein entered as aforesaid in favor of defendants, plaintiffs prosecute this appeal.

Appellants' first ground of appeal is that the grant of the foregoing permit to defendant Gregg is unconstitutional and void because such action is in excess of the authority delegated to the council by Ordinance No. 90500. This contention is predicated upon the claim that the authority delegated by the ordinance to the council is expressly limited to permit only such uses of property as are "essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan." That the stated "objectives" of the master plan as contained in section 12.02 of the ordinance preclude the granting of a permit such as the one here under consideration, which according to appellants, would injuriously affect the enjoyment by them of their properties, would jeopardize the safety of children in the community, and would militate against the promotion of the "health, safety and general welfare, all in accordance with a comprehensive plan" (Ordinance 90500, §12.02).

Sections 12.24 and 12.32-E of the ordinance authorize the council to grant a conditional use permit upon a finding that the permitted uses of the property are essential or desirable to the public convenience or welfare, and are

in harmony with the various elements or objectives of the master plan. In the proceedings now before us the council in granting the challenged permit affirmatively found those conditions to exist and further found wherein the planning commission in theretofore denying the permit, was in error. The fact that the council made such findings raises the presumption that the existence of the necessary facts had been ascertained and found (Northside Property Owners Assoc. v. County of Los Angeles, 70 Cal. App. 2d 598, 608 [161 P. 2d 613]; Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 323 [144 P. 2d 4]; Bartholomae Oil Corp. v. Seager, 35 Cal. App. 2d 77, 80 [94 P. 2d 614]).

The necessity for a conditional use permit is to be determined under section 12.24 of the ordinance by the planning commission or the city council, and their judgment should be final unless it clearly appears to be arbitrary or contrary to the law. Where a zoning ordinance authorizes the planning commission or city council to grant a conditional use permit upon finding the existence of certain facts, their action will not be disturbed by the courts in the absence of a clear and convincing showing of the abuse of the power of discretion vested in them (Otis v. City of Los Angeles, 52 Cal. App. 2d 605, 613 [126 P. 2d 954]). Whether or not the granting of the permit herein was wise as a matter of policy is something which is beyond the courts to determine unless the ordinance under which such action is taken is unconstitutional or void. The rule is indelibly written into our law that all questions of policy and wisdom concerning matters of municipal affairs are for the determination of the legislative governing body of the municipality and not for the courts. In the exercise of the policy power a large discretion is vested in the legislative branch of the government. The

function of the courts is to determine whether or not the municipal bodies acted within the limits of their power and discretion. Courts are not authorized to entertain a hearing *de novo* and then make such order as in their opinion the municipal authorities should have made. Were the rule otherwise, courts would be usurping the functions of the municipal governing body (Lockard v. City of Los Angeles, [1]33 Cal. 2d ——, —— [—— P. 2d ——]).

The determination of what harmonizes with the elements and objectives of the master zoning plan having been committed to the discretion of the local governing bodies, the burden of proving that the city council acted without substantial evidence and in excess of jurisdiction, rested upon appellants. And this requirement is not satisfied by a mere showing that there was a conflict in the evidence, or that the city council on the basis of the record before it, might have been justified in deciding differently, or that the record before the council might have supported a conclusion contrary to that which was arrived at (Hogan v. Retirement Board, 13 Cal. App. 2d 676, 677 [57 P. 2d 520]). It therefore follows that the ordinance here in question and the procedure therein authorized is neither unconstitutional or void.

It is next contended that the power vested in the planning commission in the first instance, and in the city council on appeal, to grant a conditional use permit under section 12.24 of Ordinance No. 90500, constitutes an unlawful delegation of legislative power. This claim is without merit. We are persuaded that a finding by the planning commission in the first instance, or, as in the case at bar, by the city council on appeal, of the necessary facts to

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[1]Advance Report Citation: 33 A. C. 427, 435.

justify the granting of a conditional use permit under section 12.24 of the ordinance is an exercise of *quasi* judicial, or perhaps administrative power, and does not amount to an exercise of legislative power (Nider v. Homan, 32 Cal. App. 2d 11, 15 [89 P. 2d 136]; Swars v. City of Vallejo, 64 Cal. App. 2d 858, 864 [149 P. 2d 397]; Wallace v. Board of Education, 63 Cal. App. 2d 611, 616 [147 P. 2d 8]; Irvine v. Citrus Pest District, 62 Cal. App. 2d 378, 385 [144 P. 2d 857]). The essential requirement of due process is met when the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made. Such a discretion is not arbitrary or so unguided as to invalidate the statute or ordinance (People v. Walton, 70 Cal. App. 2d Supp. 862, 870 [161 P. 2d 498]).

As was said by the Supreme Court in Gaylord v. City of Pasadena, 175 Cal. 433, 436 [166 P. 348]:

"Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many *quasi*-legislative and *quasi*-judicial functions, which in similar communities and under more primitive conditions were performed directly by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic, and is thus sanctioned by the highest law. For, as the supreme court of the United States declares:

'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business' (Union Bridge Co. v. United States, 204 U. S. 364 [51 L. Ed. 523, 27 S. Ct. 367].)" See, also, Dierssen v. Civil Service Commission, 43 Cal. App. 2d 53, 59 [110 P. 2d 513], and Carter v. Stevens, 211 Cal. 281, 289 [295 P. 28].

In the case of Johnston v. Board of Supervisors, 31 Cal. 2d 66, 73 [187 P. 2d 686], it was held that "The general rule, however, is that even the broader power to authorize a variance from the terms of a zoning ordinance may be granted to an administrative board without violating the principle against the delegation of legislative powers." While the legislative body cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.

It must therefore be held that the power granted by section 12.24 of the ordinance to the planning commission in the first instance, and to the city council on appeal, to grant conditional use permits in the particular instances specified, was not intended to, nor does it confer any power to amend or alter the zoning ordinance itself, nor does it delegate any legislative power. Neither is it a grant of power to create variances for nonconforming uses. That power is contained in section 12.26 of the ordinance. It will be noted that conditional use permits are confined to uses of public concern, such as airports, cemeteries, development of natural resources, public utilities, educational institutions, libraries, and governmental enterprises. By

the specific terms of the ordinance such uses are permitted in any zoning district subject only to a finding by the planning commission, in the first instance, or the city council on appeal, that the use is essential or desirable to the public convenience or welfare. The decision to grant a conditional use permit does not create a new zone. It merely affirms as a fact the existence of the circumstances under which the ordinance by its terms prescribed that such permit shall issue.

Appellants next assail the granting of the conditional use permit herein as unconstitutional and void because, as they contend, the act is an unreasonable, and therefore, an unconstitutional exercise of the police power. As we view appellants' argument in this regard, they do not attack the constitutionality of the ordinance, indeed, they rely upon it and attack as unconstitutional the action of the city council in granting the conditional use permit in this particular instance because such action was unreasonable. Appellants urge that the action of the council was unreasonable and in excess of the authority delegated to it by Ordinance No. 90500 for the reason that the conditional use permit does not harmonize with the elements or objectives of the master plan. It would appear that the "Master Plan" is something distinct from the zoning ordinance. It is authorized by "The Planning Act of 1929" (Stats. 1929, p. 1805; 2 Deering's Gen. Laws, Act 5211b). A reading of the Planning Act of 1929 reveals the "Master Plan" to be "a comprehensive, long-term general plan for the physical development of the city . . . which in the commission's judgment bears relation to the planning thereof." The zoning ordinance may have been adopted to implement the "Master Plan," but it is not the plan itself. In any event, the "Master Plan" with its accompanying maps, diagrams, charts and reports (as pro-

vided for in the foregoing Planning Act of 1929) was not introduced into evidence. There was, however, the testimony of a former director of city planning of defendant city to the effect that the conditional use permit was in harmony with the master plan. And the city council specifically found that the conditional use permit was "essential to the public convenience and welfare and is in harmony with the various elements or objectives of the Master Plan." Accordingly, there arose a presumption of the existence of the necessary facts to support such finding (Northside Property Owners Association v. County of Los Angeles, *supra,* p. 608; Lindell Co. v. Board of Public Appeals, *supra,* p. 323; Bartholomae Oil Corp. v. Seager, *supra,* p. 80). This presumption was not overcome, but in fact, was strengthened by the evidence. The finding of the trial court that the conditional use permit was not repugnant to the master plan was justified and proper. We perceive nothing unreasonable in the action of the city council granting the conditional use permit to defendant Gregg. The latter was possessed of an inherent right to remove rock and gravel from his own land unless and until prohibited by an exercise of the police power of the city of Los Angeles. By the adoption of Ordinance 90500 that right was suspended. The granting of the permit did not give defendant Gregg any right not theretofore vested in him. It merely removed the impediment imposed by the exercise of the police power. And the reasonableness of the zoning as applied to certain lines of commercial zoning must be distinguished from the reasonableness of zoning regulations prohibiting the development of natural resources. The exclusion of ordinary business enterprises does not destroy any inherent property right, and, if not discriminatory, will be held reasonable and valid. Most such businesses can be conducted at any other designated place. But rock and gravel, like any other

natural resource, can be obtained only in those particular areas where the deposit has been lodged by nature. Therefore, it follows that to absolutely prohibit the removal of rock, sand and gravel from one's own land in an instance where such land is primarily valuable only by reason of the existence of rock, sand and gravel, might be regarded as an unreasonable exercise of the police power (Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 789 [194 P. 2d 148]). The permit granted respondent Gregg does not restrict appellants in the use of their own property. And they have no vested right in the maintenance of restrictions on respondent Gregg's property. It may be true that to continue the zoning restrictions upon respondent Gregg's property might have conferred benefit on neighboring owners and enhanced the value of their property, but the existence of benefits does not generate interests protected by the Constitution against diminution by governmental authorities in the proper exercise of the police power. Zoning regulations are not contracts by the city and may therefore be modified by the latter. Property is always held subject to the valid exercise of police power. The theory of vested rights relates only to such rights as an owner of property may possess not to have his property rezoned after he has started construction thereon or was making a use thereof permitted by law, when such construction or use does not constitute a nuisance (Dobbins v. City of Los Angeles, 195 U. S. 223 [25 S. Ct. 18, 49 L. Ed. 169, 176]; Trans-Oceanic Oil Corp. v. City of Santa Barbara, supra, p. 787). The adoption of Zoning Ordinance No. 90500 gave appellants no vested rights which would prevent defendant city from subsequently amending the ordinance or granting a conditional use permit thereunder. The provisions of the ordinance restricting the uses to which respondent Gregg's property could be put did not result in a contract with

appellants divesting the city of the right to subsequently change the ordinance or to grant a conditional use permit adversely affecting the property of appellants (Acker v. Baldwin, 18 Cal. 2d 341, 345 [115 P. 2d 455]; Otis v. City of Los Angeles, *supra,* p. 613). As affecting the challenged reasonableness of the action of the city council in granting respondent Gregg a conditional use permit, there was testimony that his property is located in an area which has long been a rock and gravel producing section. That within a radius of a mile and a quarter from the subject property are located 15 gravel pits, some active and others idle. That there is a public need for rock and sand located on this particular property, and that it would be compatible with the greatest public service and the least private injury to expand the M-3 or unrestricted use zone to include all of the land in an area in which the Gregg property is located. There is also evidence in the record that the highest and best use of the subject property is for the excavation of rock, sand and gravel, and that said land has little value for any other use; that if the Gregg plant were forced to shut down for lack of materials, it would be impossible to furnish the city of Los Angeles with its requirements of rock and sand; that the Gregg plant supplies approximately 30 per cent of all of the rock and gravel mined from the San Fernando area, and that if this plant were shut down, there are no other plant facilities at this time available to supply the resulting deficit; that the Gregg plant is the most modern plant in the San Fernando Valley; that nowhere in the United States have conditions been attached to the operation of rock and gravel properties as stringent as those attached by the city council to the operations in the subject area, and that the operation of the subject property under the permit will constitute a reasonable and necessary method

of operation usually and ordinarily conducted by rock plants.

The transcript contains volume after volume of additional testimony and evidence showing the public necessity and the reasonableness of the city council's action in granting the permit.

In addition, there is the fact that by stipulation the trial judge spent two whole days personally viewing the entire area, including all of the rock plans, and also including all of the properties owned by plaintiffs herein. It is well settled that when a trial judge by stipulation of the parties, as here, views the territory involved in an action, his observations on such a tour become evidence in the case (Safeway Stores, Inc., v. City Council, [1]86 Cal. App. 2d 277, 284 [194 P. 2d 720]), and that what is then seen may be used alone or with other evidence to support the findings (Neel v. Mannings, Inc., 19 Cal. 2d 647 [122 P. 2d 576]; 24 Cal. Jur., p. 921; Gularte v. Martins, 65 Cal. App. 2d 817 [151 P. 2d 570]; see, also, collection of authorities cited in McBaine Cal. Evidence Manuel (1948 Supp.), p. 32). It therefore follows that independent evidence consisting of the view by the court must be considered as having supported the reasonableness of the city council's act in granting the conditional use permit, especially when considered in connection with the vast volume of testimony in support thereof as disclosed by the transcript.

As a further ground for reversal, appellants assert that the permit granted respondent Gregg is void, "because the City is estopped in the circumstances of this case, to thus impair the personal and property rights" of appellants.

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[1]Advance Report Citation: 86 A. C. A. 301, 308.

As we have heretofore pointed out, no person has a vested right in the exercise of the police power and exercise of the same may not be limited by private contract or restrictive covenants (Acker v. Baldwin, *supra*, p. 345). Private agreements are not to be considered when determining the validity of a zoning ordinance (O'Rourke v. Teeters, 63 Cal. App. 2d 349, 352 [146 P. 2d 983]). Appellants' contention that an estoppel arises because, prior to the year 1946 the Gregg and surrounding lands had been zoned for residential purposes is equally unavailing. The existence of such zoning ordinance gave appellants no vested right which would operate to prevent defendant city from subsequently amending the ordinance. And, as a matter of fact, the conditional use permit granted respondent Gregg was not the result of an amendment to the ordinance, but was in conformity with the existing provisions thereof. Appellants place great reliance upon the case of Times-Mirror Co. v. Superior Court, 3 Cal. 2d 309 [44 P. 2d 547], but the facts of that case are clearly distinguishable from those in the case at bar. It is only in exceptional cases that estoppels against public authority may be invoked. And the cases wherein the doctrine was applied all involved most unusual sets of facts. As was said by this court in Donovan v. City of Santa Monica, [2]88 Cal. App. 2d ——, —— [199 P. 2d 51]: "There is no doubt that the general rule is that estoppel will not be invoked against the government or its agencies except in rare and unusual circumstances. (See cases connected in 19 Am. Jur., p. 818, §166.)" We find no analogy between the facts in the case now engaging our attention and those cases wherein the doctrine of estoppel has been invoked against the municipality.

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[2]Advance Report Citation: 88 A. C. A. 398, 406.

Appellants' next contention is that in a suit in equity such as the one now before us the reasonableness of the act done presents a judicial, not a legislative question, and that it becomes the duty of the court to hear and determine that question upon its own record of individual investigation and upon its own responsibility. We deem it unnecessary to discuss this claim because that is exactly what the court did in the instant case. It did not limit its investigation to the record before the city council. True, the court found that the action of the city council in granting the conditional use permit was neither arbitrary, capricious nor unreasonable, but in arriving at that conclusion the court did not accept the record before the city council as final and conclusive. In determining the legality and reasonableness of the council's action, as well as the question of whether needless oppression was wrought by such action and whether constitutional rights were thereby invaded, the court not only heard over 5,000 pages of testimony and considered 288 separate exhibits, but in addition, made its own individual investigation by viewing the subject property and surrounding territory for two days, which, as hereinbefore indicated, in itself constitutes a species of evidence. Manifestly, the determination of the issues in this case was made on the court's "investigation upon its own responsibility," and was not confined to a consideration solely of the record before the city council.

Appellants next contend that in this action in equity they are entitled to an injunction to prevent a threatened interference with their constitutional right to own and enjoy their property. Although not specifically stated in appellants' briefs, an examination of the pleadings coupled with the arguments advanced in their briefs leads us to the conclusion that appellants seek to enjoin respondent

Gregg's operations as an anticipated nuisance. When viewed in the light of the conditions imposed by the city council in granting the conditional use permit and the additional conditions imposed by the trial court in its judgment, we are persuaded that the conduct of respondent Gregg's operations, subject to the foregoing conditions imposed thereon, justified the conclusion of the trial court that the same would not result in any substantial injury to appellants nor to the ownership or enjoyment of their property.

Where as here, the operations in question could not be characterized as a nuisance *per se,* the court was justified in following a well established rule of law which provides that under such circumstances the decree should not enjoin more than the specific thing which might constitute a nuisance, as appears from the requirements of the particular case (Pomeroy's Equity Juris. (2d ed.), §§1945, 1948). It is now established law in this state that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and the regulation thereof should go no further than to control those particular features of the operations which might result in substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the land upon which the operations are being conducted (People v. Hawley, 207 Cal. 395, 412 [279 P. 136]; *In re* Smith, 143 Cal. 368, 371 [77 P. 180]; *In re* Kelso, 147 Cal. 609, 613 [82 P. 241, 109 Am. St. Rep. 178, 2 L. R. A. N. S. 796]; Byers v. Colonial Irrigation Co., 134 Cal. 553, 555 [66 P. 732]; Vowinckel v. N. Clark & Sons, 216 Cal. 156, 162 [13 P. 2d 733]).

There is substantial evidence in the record herein that respondent Gregg's plant is the most modern in the San Fernando Valley and that the operation of the plant under

the restrictive terms of the conditional use permit and the judgment will constitute a reasonable method of operation in the manner usually and ordinarily governing the operation of rock plants. The court was therefore justified in giving heed to the aforesaid rule, that in proper cases it will not enjoin the conduct of a defendant's entire business where such business is not a nuisance *per se* if less measure of restriction will afford plaintiffs the relief to which they may be entitled.

Appellants' contention that the court in the present action in equity was clothed with jurisdiction to absolutely prohibit respondent Gregg's operations is further answered by the provisions of section 731a of the Code of Civil Procedure reading as follows:

"731a. [Manufacturing or commercial operations in established zones not enjoinable nor deemed nuisance: Operation producing offensive odors.] Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial uses are expressly permitted, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation . . ."

While respondent Gregg was not operating in a zone wherein "manufacturing or commercial uses are expressly permitted," he was operating in a zone in which the ordinance authorized the issuance of conditional use permits, and the evidence adduced at the trial brings this case within the provisions of section 731a of the Code of

Civil Procedure above quoted. There being no evidence that respondent Gregg employed, or under the restrictions of the permit and judgment, would employ unnecessary and injurious methods of operation, the trial court was not authorized to grant appellants injunctive relief (McNeill v. Redington, 67 Cal. App. 2d 315, 318 [154 P. 2d 428]; Northside Property Owners Assoc. v. Hillside Memorial Park, 70 Cal. App. 2d 609, 617, 618 [161 P. 2d 618]).

Furthermore, section 3482 of the Civil Code reads as follows:

"Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Ordinance No. 90500, having been duly enacted by the city of Los Angeles within the scope of the authority conferred upon it, has the same force within its corporate limits as a statute passed by the Legislature has throughout the state (Monterey Club v. Superior Court, 48 Cal. App. 2d 131, 147 [119 P. 2d 349]; *Ex parte* Roach, 104 Cal. 272, 274 [37 P. 1044]). As heretofore pointed out, respondent Gregg was operating pursuant to a permit authorized by the city ordinance.

Appellants challenge 46 of the 67 numbered paragraphs of Findings of Fact, declaring in that regard that "There is no evidence in this record which supports any of the Findings of Fact here challenged. Wherein a so-called Finding of Fact, is a conclusion of law, such conclusion is without any support in legal authority."

It would unduly prolong this already lengthy opinion to discuss *seriatim* the challenged findings and the objections made thereto. Suffice it to say that the affirmative findings are responsive to the issues framed and supported by substantial evidence, while the negative findings are justified by the rule that where no evidence is introduced

in support of an issue findings should be made thereon against the party who has the burden of proof (Haney v. Kinevan, 73 Cal. App. 2d 343, 344 [166 P. 2d 361]). The rule is elementary that when an attack is made upon findings or a judgment upon the ground that they or it are or is not supported by the evidence the power of reviewing courts begins and ends with a determination of whether there is any substantial evidence contradicted or uncontradicted, which will sustain the findings made or the judgment rendered. An examination of the findings herein precludes a reversal of the judgment because we cannot say from a review of the record that, accepting the full force of the evidence adduced, together with every inference favorable to respondents which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the challenged finding or findings made.

We have noted the other contentions made on this appeal, one by appellants that actual and punitive damages may be recovered in this form of action, and the other by respondents that appellants' case is moot by reason of the adoption of an ordinance by respondent city on January 5, 1948, amending sections 12.20 and 12.24 of the Los Angeles Municipal Code, of which Municipal Code Ordinance No. 90500 (here under consideration) is a part. In view of the foregoing conclusions at which we have arrived, we deem it unnecessary to discuss them.

For the foregoing reasons the judgment is affirmed.

York, P. J., and Doran, J., concurred.